85-692

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

KATHRYN A. SHUBA,
Petitioner,
vs.
AUSTINTOWN BOARD OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

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216/762-0771

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Kathryn A. Shuba

QUESTIONS PRESENTED

1. Did the board of education's radically disparate treatment of a public school teacher who was assigned to teach parochial school students violate the equal protection clause of the Fourteenth Amendment?

2. Did the board of education violate a teacher's due process, liberty interest by willfully concealing and subsequently considering a parochial principal's derogatory information which was dispositive of terminating the teacher who was entitled to tenure and future employment?

3. Considering this Court's recent decision in Loudermill, does a limited contract teacher qualified for tenure,

have a property right in continued employment?

PARTIES BELOW

The parties below were Petitioner, Kathryn Shuba, Appellant in the Supreme Court of Ohio and Respondent, Austintown Local School District Board of Education, Appellee in the Supreme Court of Ohio.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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* * * *

KATHRYN A. SHUBA

Petitioner,

vs.

AUSTINTOWN BOARD OF EDUCATION

Respondent.

* * * *

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

The petitioner, Kathryn Shuba, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on June 19, 1985.

OPINION BELOW

No opinion was rendered by the Supreme Court of Ohio. The opinion of the Ohio Seventh District Court of Appeals, not yet reported, appears in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 19, 1985. dismissing sua sponte, petitioner's appeal for the reason that no substantial constitutional question existed. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitution of the United States, Amendment Fourteen

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code §3317.06, §3319.11, §3319.16, and §3319.25

Statutes are provided in the Appendix.

STATEMENT OF THE CASE

Kathryn Shuba, Petitioner, was a teacher who was assigned to teach four years out of a five year period at Immaculate Heart of Mary parochial school in the Youngstown area under the auspices of the Austintown Local School District Board of Education, (hereinafter "Austintown"), pursuant to a program known as the auxiliary services program authorized by Ohio Revised Code §3317.06. She had a professional teaching certificate effective July 1, 1978, entitling her to tenure; was arbitrarily denied a continuing (tenured) contract in the fall of 1978; and was unjustly dismissed in 1979 without any reasons being given and contrary to Austintown policies.

As a teacher assigned to the auxiliary services program, she received radically disparate treatment and was denied due process and equal protection of the laws of Ohio and the Federal Constitution.

A Complaint was filed on September 26, 1980, and amended in July 1982, alleging, among other things:

1. Breach of contract and subsequent wrongful discharge;

2. Age discrimination;

3. Deprivation of equal protection and due process of law;

4. Conspiracy; and

5. Excessive entanglement.

There was no hearing on the merits of this case as all causes of action were determined by summary judgment.

Kathryn Shuba appealed all issues including her right to a jury trial.

The Ohio Seventh District Court of Appeals, Mahoning County, affirmed the trial court on all issues with the exception of Kathryn Shuba's claim of breach of contract which is not at issue here.

Kathryn Shuba further appealed all matters except the conspiracy and entanglement issues to the Supreme Court of Ohio. In a four to three decision, the Supreme Court of Ohio summarily dismissed the appeal for the reason that no substantial constitutional question existed.

Petitioner filed a Motion for a Rehearing based on this Court's recent decision in Cleveland Board of Education v. Loudermill, 53 U.S.L.W. 4306 (US March

19, 1985). The Supreme Court denied this motion on June 19, 1985.

Respondent filed a cross appeal which is not material to this Petition.

REASONS FOR GRANTING THE WRIT

I.

THERE IS NO RATIONAL BASIS FOR TREATING TEACHERS ASSIGNED TO THE AUXILIARY SERVICES PROGRAM IN A RADICALLY DISPARATE MANNER.

In Ohio, all teachers are governed by the same contractual rights and responsibilities pursuant to Ohio Revised Code §3319.07 through §3319.17. There is no statute in Ohio which authorizes a separate classification for "auxiliary services teachers". In this case, Austintown assigned Kathryn Shuba to teach in a parochial school and arbitrarily classifed her as an auxiliary

services teacher and treated her as a second class citizen.

Kathryn Shuba was disparately treated as follows:

1. Auxiliary services teacher contracts varied significantly from teachers not teaching in parochial schools.

2. Termination procedures for auxiliary services teachers varied significantly from teachers not teaching in parochial schools.

3. Kathryn Shuba was isolated in a van on parochial school property without being assigned a supervisor or building principal.

4. Austintown failed to comply with their own declared policies and procedures.

a. She was only evaluated during her last year of teaching and was denied an opportunity to correct deficiencies in violation of Austintown's Guidelines for a System of Evaluation.

b. She was not given the opportunity to read the parochial school principal's derogatory letter which formed the basis of the board's action in terminating her, in violation of Austintown's Professional Personnel Records Policy.

c. She had no access to job opportunities, vacancies or transfers.

d. She received no mail, directions or communications in regard to in service meetings or professional programs.

The Seventh District Court of Appeals, Mahoning County relied on Board

of Educ. v. Walter, 58 Ohio St. 2d 368 (1979) cert. den., 444 U.S. 1015 (1980). (Appendix A30-A31):

> Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any classification based 'upon a state of facts that reasonably can be conceived to constitute differences in state policy...' will be upheld. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530, (1959).
>
> This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt...
>
> An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

Certainly, the rational basis test of Board of Educ. v. Walters and Allied, which was an economic and commercial classification, should not apply to this case.

At the minimum level, this Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives". Schweiker v. Wilson, 450 U.S. 221, 230 (1981). This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one,'" id., as 234, quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976); the classificatory scheme must "rationally advance a reasonable and identifiable governmental objective."

Schweiker v. Wilson, 450 U.S., at 235. Logan v. Zimmerman Brush Co., 455 U.S. 422, 439, (1982) (separate opinion by Justices Blackmun, Brennan, Marshall and O'Connor regarding the equal protection claim.)

Disparate treatment of teachers assigned to teach parochial students, unrelated to the operation of the auxiliary services program, was unjustified, and hence arbitrary and in violation of the constitutional guarantee of equal protection.

In this Court's recent decision of City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (US July 1, 1985) Justice Stevens, with whom the Chief Justice joins, concurring with the majority, states:

The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational" - for me at least - includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications.

The Austintown board refuses to advance any rationale for the instances of disparate treatment except to indicate that the entire program was in jeopardy of funding cuts. This refusal was accepted as legitimate by the Seventh District Court of Appeals. (Appendix A32). All teachers within the school were subject to the same fiscal uncertainties. No indication was given as why the uncertainty of funding justified the disparate treatment with respect to personnel policies, evaluation procedures, communications, job transfer policies and termination procedures.

Austintown failed to indicate why the auxiliary services program funding was any more uncertain than other educational programs after the constitutionality of the entire program

was upheld. Wolman v. Walter, 433 U.S. 229 (1977). Austintown even continued to affix to a teacher's contract assigned to the auxiliary services program a contingency as to funding after Wolman had been decided. In any event, to the extent that funding for the auxiliary services program was governed by the same rules of fiscal planning as are all legislatively funded programs, teachers within the program should not be disparately treated from teachers not within the program. Indeed, to the extent that any additional uncertainty existed as to the funding of the program, Austintown should have assisted teachers within the program to find job transfer opportunities so as to avoid the appearance of disparate treatment.

The instant case, as well, should be more carefully scrutinized because of involvement of issues concerning Kathryn Shuba's right to work and practice her chosen profession. The distinctly separate interests in this case are: Austintown's responsibility to administer the auxiliary services program and Kathryn Shuba's interest in professional growth and career advancement. A fair balancing of these interests requires a more careful or "heightened" analysis than the usual rational basis test because Austintown policies have pre-empted the teacher's interests. In cases where such "preferred" or "sensitive" as opposed to "fundamental" interests are at stake, the Fourteenth Amendment requires that disparate treatment be viewed with a "heightened

scrutiny." Turner v. Department of Employment Security of Utah, 423 U.S. 44, 46 (1975); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); See generally, Tribe, American Constitutional Law, (1978) Ch. 16, pp. 991-1136.

Under Ohio law, there is only one classification of teachers. Kathryn Shuba had a statutory and constitutionally protected right to be treated equally with other teachers and to be accorded the same treatment pursuant to local board policies and state law. It offends one's sense of justice that school administrators disregard their own official policies, state and constitutional law, and inflict injuries on the teachers assigned to teach in the auxiliary services program.

II.

A TEACHER WHO IS ENTITLED TO TENURE HAS A PROTECTED LIBERTY AND PROPERTY INTEREST IN FUTURE EMPLOYMENT.

A. A teacher who is entitled to tenure has a protected liberty interest in access to information determinative of future employment.

In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972), this Court stressed that procedural due process must accompany the termination of a public employee if the discharged employee has been deprived of a property or liberty interest protected by the Fourteenth Amendment.

Liberty takes on an additional meaning where termination of employment is involved. This Court in Arnett v. Kennedy, 416 U.S. 134 (1974), held that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of the employee.

In this case, had Petitioner been able to proffer evidence on the merits, it would have been shown that evidence used by the Board in determining whether or not to renew Kathryn Shuba's teaching contract was withheld from her, and only produced as part of the discovery process in the instant litigation.

Furthermore, Kathryn Shuba was subjected to unorthodox evaluation procedures which effectively prevented

her from having the opportunity afforded other teachers not within the auxiliary services programs, to make use of the evaluation recommendations and to correct any deficiencies in her teaching style.

The effect of the Board's action was to prevent Kathryn Shuba from the right to pursue her chosen occupation and to protect her reputation as an effective educator, both of which are liberty interests protected by the Fourteenth Amendment.

To date, as a result of the stigma imposed by her termination, she has been unable to acquire employment as a teacher. As a holder of bachelor's and master's degrees in education, and professional and supervisory teaching certificates, she has been irreparably harmed.

In Roth, this Court stated:

> While this court has not attempted to define with exactness the liberty... guaranteed (by the Fourteenth Amendment) the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge... 408 U.S. at 572.

B. A teacher who is entitled to tenure has a protected property interest in continued employment, requiring both procedural and substantive precautions prior to termination.

This Court has clearly held that a tenured teacher has a property interest in continued employment; Board of Regents v. Roth, 408 U.S. 564 (1972); and has

most recently indicated that "the significance of the private interest in retaining employment cannot be gainsaid"; Cleveland Board of Educ. v. Loudermill, 53 U.S.L.W. 4306 (US March 19, 1985).

The competing interest as emphasized in Loudermill, must be balanced with:

> "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees, and the avoidance of administrative burdens, and the risk of an erroneous termination." Id., at 4308.

In this case, Kathryn Shuba had fulfilled the statutory requirements for a tenured contract and had submitted the appropriate documents to the board for processing her professional certificate. Because of the disparate treatment, a delay resulted in processing the documents causing the appropriate

professional teaching certificate to be issued after Kathryn Shuba signed a limited (non-tenured) employment contract, dated as being effective before having signed the contract. In any event, Kathryn Shuba held the professional certificate early into her final year of teaching in Austintown and well before the Board's action in terminating her.

Qualifications for a continuing contract (tenure) required that a teacher have a professional teaching certificate and have taught three out of five years in the school district. Ohio Revised Code §3319.11. (Page's 1980). A professional certificate is granted to teachers who have met the standards of preparation, experience, and teaching

success set by the board. Ohio Revised Code §3319.25. (Page's 1980).

As one qualified for tenure, Kathryn Shuba had an expectation that she would be afforded appropriate opportunities with which to defend her right to continued employment and be given appropriate procedural devices with which to pursue the substantive rights involved. Such meaningful opportunities were denied.

Kathryn Shuba was terminated on April 23, 1979. (Appendix A68). No reasons for the termination were given to her.

The Ohio Revised Code provides procedures to be adhered to by a board in terminating the contract of a teacher and further provides that such termination may not be made without just cause. Any

teacher who is teaching, or should be teaching, under a continuing contract is deemed to be employed until the "teacher resigns, elects to retire... or is terminated or suspended." Ohio Revised Code Ann. §3319.16 (Page's 1980). Thus a teacher in such a situation is statutorily guaranteed minimum procedural rights on termination.

Clearly, Austintown failed to comply with the provision of this statute and failed to provide the due process conferred by Constitutional guarantee. Loudermill, 53 U.S.L.W. at 4308.

Since the language of the statute is such as to grant only a minimal standard of protection to a teacher, a board of education is free to adopt more stringent procedural safeguards so long as the rights and responsibility of the school

board is not thereby abrogated. Struthers City School Board of Educ. v. Struthers Educ. Ass'n, 6 Ohio St. 3d 308 (1983); Tracy v. Otsego Board of Educ., 6 Ohio St. 3d 305 (1983); and Dayton Teachers Ass'n v. Dayton Board of Educ., 41 Ohio St. 2d 127 (1975).

In the instant case, Austintown, after negotiations with the Austintown Education Association, as collective agent of the teachers within the district, adopted a Teacher Contract Non-Renewal Policy that specifically provided that "a teacher under a limited contract shall be notified by the Board, in writing by April 30th, of the Board's intent not to re-employ. A teacher so notified will be advised of the cause for such a decision." (Emphasis added).

While Kathryn Shuba has argued that she held a professional certificate and was entitled to the benefits of a continuing contract, assuming, arguendo, that indeed the limited contract by which Kathryn Shuba was employed was valid, the board failed to abide by its own policy in non-renewing Kathryn Shuba.

The Seventh District Court of Appeals, Mahoning County, held that under Ohio Revised Code §3319, a non-tenured teacher had no expectancy of continued employment pursuant to Matheny v. Bd. of Educ., 62 Ohio St. 2d 362, 364 (1980), and Ryan v. Aurora City Bd. of Educ., 540 F. 2d 222 (6th Cir. 1976), cert. den., 429 U.S. 1041 (1977). (Appendix A31-A32).

Kathryn Shuba's facts are unlike the facts in Ryan and Matheny. The teachers in Ryan and Matheny did not hold

professional certificates, they were not disparately treated by being assigned to teach in the auxiliary services program, and the schools did not have negotiated policies and procedures. The Ohio courts totally ignored the following first and fourth headnotes in Ryan:

> Due Process hearing must be accorded a non-tenured teacher if his contract is not renewed because he exercised his rights of free speech as guaranteed by First Amendment or if non-renewal is in violation of self-incrimination clause of Fifth Amendment, Due Process Clause of Fifth or Fourteenth Amendment, or equal protection clause of Fourteenth Amendment.
>
> Non-tenured teacher may acquire expectancy of continued employment where policies and practices of the institution rise to the level of implied tenure.

Kathryn Shuba was assigned to teach in the auxiliary services program. Each year, she was given a Notice-Termination

of Contract and then rehired each fall. Having received her professional teaching certificate in 1978, and qualified in all respects for a continuing contract, she reasonably expected continued employment in April 1979.

Clearly, Kathryn Shuba had a protected liberty and property interest in retaining employment. Unequivocably, she was denied any procedural due process and as a result of this unjust deprivation of her constitutional rights she has been unable to secure another teaching position.

CONCLUSION

This case involves a school board's blatent disregard of Kathryn Shuba's constitutional rights. This case involves three state courts which have

summarily dismissed Kathryn Shuba's substantial constitutional claims without a trial to determine the facts or merits of her case. She has not had a hearing to cross examine witnesses or to present witnesses on her behalf. This is a travesty of justice! Petitioner requests that this Court grant her Petition for a Writ of Certiorari to review the judgment from the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO

OVERRULING THE MOTION TO CERTIFY

(Dated June 19, 1985)

No. 85-486

THE SUPREME COURT OF OHIO

Columbus, Ohio

* * * *

KATHRYN A. SHUBA

Appellant / Cross Appellee

vs.

AUSTINTOWN BOARD OF EDUCATION

Appellee / Cross Appellant

* * * *

APPEAL FROM THE COURT OF APPEALS

FOR MAHONING COUNTY

Upon consideration of the motion and cross-motion for an order directing the Court of Appeals for Mahoning County to

certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO

OVERRULING MOTION FOR REHEARING

(Dated June 19, 1985)

No. 85-486

THE SUPREME COURT OF OHIO

Columbus, Ohio

* * * *

KATHRYN A. SHUBA

Appellant / Cross-Appellee

vs.

AUSTINTOWN BOARD OF EDUCATION

Appellee / Cross-Appellant

* * * *

It is ordered by the Court that rehearing in this case be and the same is hereby denied.

DECISION AND JOURNAL ENTRY OF THE

COURT OF APPEALS

(Dated January 25, 1985)

Case No. 83 C.A. 81

IN THE COURT OF APPEALS

SEVENTH JUDICIAL DISTRICT

* * * *

KATHRYN A. SHUBA

Plaintiff / Appellant

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant / Appellee

* * * *

Appeal From Judgment Entered in the Common Pleas Court County of Mahoning, Ohio Case No. 80 CV 1712

DECISION AND JOURNAL ENTRY

LYNCH, J. Retired.

Plaintiff is appealing all the judgments of the Common Pleas Court in

this case which sustained the various motions of defendants for summary judgments. Such a motion, as to Count I of plaintiff's Complaint, was sustained by the trial court by a Judgment Entry dated February 8, 1982. As to Counts II, III and IV of plaintiff's Complaint, such a motion was sustained by the trial court by a Judgment Entry dated September 13, 1982. As to Count V, which was included in plaintiff's Amended Complaint, which was filed August 9, 1982, such a motion was sustained by the trial court by a Judgment Entry dated June 15, 1983.

The record in this case is voluminous and consists of two volumes of the transcript of the pleadings and original papers with 121 items which include, among other things, several affidavits. In addition thereto, there

are depositions of all the pertinent parties and non-parties in this case which total approximately 800 pages.

Most of the pertinent facts of this case are undisputed. However, there are some disputed facts which will be pointed out in this opinion together with the source of such facts.

Plaintiff was employed by defendant Board of Education as a teacher of remedial reading under the auxiliary services program in the Immaculate Heart of Mary Parochial School for the school years 1974-75, 1976-77, 19877-78 and 1978-79, under a series of one-year limited contracts. Her services with defendant Board of Education were terminated at the end of the 1978-79 school year.

Plaintiff's employment history with defendant Board of Education is intertwined with the history of federal court litigation over the constitutionality of state aid to nonpublic school students. Prior to plaintiff's employment, Ohio's "Auxiliary Services" educational program was unsuccessfully challenged in 1974 by citizens and taxpayers on First Amendment grounds. Wolman v. Essex, Case No. 73-292 (S.D. Ohio 1974).

The Wolman case was appealed to the United States Supreme Court which vacated the judgment of the District Court and remanded the case for further consideration in light of Meek v. Pittinger (1975), 421 U.S. 349. Wolman v. Essex (1975), 421 U.S. 982.

The Ohio General Assembly then repealed the existing Auxiliary Services program effective August 29, 1975 (136 Ohio Laws 524) and enacted a new Auxiliary Services program to cure the constitutional defects. This statute was also challenged. On June 21, 1976, a three judge district court panel held the newly enacted Auxiliary Services program constitutional in all respects. Wolman v. Essex (1976), 417 F. Supp. 1113 (S.D. Ohio). This decision was appealed.

On July 24, 1977, the United States Supreme Court upheld the Auxiliary Services program because the teachers had to be employed by the public school board or by the State Department of Health and had to provide the services "in public schools, in public centers, or in mobile units located off the nonpublic school

premises." Wolman v. Essex (1977), 433 U.S. 233, 244-248. R.C. 3317.06(G).

Plaintiff graduated from Youngstown State University in 1972 and did substitute teaching for the following two school years. Upon the recommendation of the principal of Immaculate Heart of Mary Parochial School, plaintiff was initially employed by defendant Board of Education for the 1974-75 school year under the auxiliary services program. She taught in Immaculate Heart of Mary School Building and was supervised by the principal of such school.

Because of the United States Supreme Court decisions on governmental aid to religious schools, there was no state funds for the 1975-76 school year and the Catholic Diocese of Youngstown hired plaintiff to continue teaching remedial

reading at Immaculate Heart of Mary School for the 1975-76 school year.

Since the constitutionality of the newly enacted state laws on auxiliary services was upheld by the United States District Court in June 1976, state funds became available for auxiliary services and plaintiff was hired by defendant Board of Education for the 1976-77 school year.

Under the auxiliary services program, of which the state is the only source of funding, the State of Ohio requires public school districts to provide certain services including remedial reading and supplies to nonpublic students. R.C. Sections 3317.024(P) and 3317.06.

The guidelines for the implementation of applicable statutory

provisions providing services and materials to pupils attending nonpublic schools, which were issued by the Ohio Department of Education, state that the public school district shall provide the delineated educational services and materials pursuant to applications submitted jointly by the administrative head of the nonpublic school and a parent (of a nonpublic school pupil) representative from each nonpublic school within the district.

Since it was the prerogative of each parochial school to determine the specific auxiliary services it desired, each school year and state funds were the only source for such program, defendant Board of Education nonrenewed the limited contracts of auxiliary services teachers in April of each year. This procedure

was applied to plaintiff. If the auxiliary services funds were available and the parochial school requested the particular services for the next school year, defendant Board re-employed the auxiliary services teacher. In this manner, defendant rehired plaintiff for the 1976-77, 1977-78, and 1978-79 school years upon the recommendation of the school principal of Immaculate Heart of Mary Parochial School.

It was the policy of defendant Board of Education to evaluate every teacher, who would become eligible for a continuing contract at the end of a particular school year, during the school year prior to such eligibility and that such evaluation would be done by the principal of the school at which such teacher taught. Pursuant to such policy,

defendant Valot, the Superintendent of defendant Board of Education, met with Sister Mary deAngelis, principal of Immaculate Heart of Mary Parochial School in March 1978 and requested her to evaluate plaintiff. However, such principal declined to do so because the youngstown Catholic Diocese took the position that, pursuant to the law, auxiliary service teachers were public employees and should be evaluated by the administrative personnel of the school district which employed them.

By letter dated May 25, 1978, to Valot, Sister Mary deAngelis, stated, in pertinent part, as follows:

> "Mrs. Kathryn Shuba wishes to apply for tenure with the Austintown Board of Education as a remedial reading teacher and has asked me to write my recommendation in this regard.

"...I have known Mrs. Shuba for the past two years and have observed the work she has done in remedial reading during this time. Although I had planned to rehire her for the next school year, I would not recommend her for tenure for the following reasons:

"-Her work with the students is only fair and she is weak in discipline even with the small groups

"-State funds for rehiring special teachers are not that certain from year to year as we have experienced in the past

"-The needs of the school in the future may be such that the money might be used better for other services such as an LD Tutor.

"Because of the above circumstances I highly discourage tenure for Mrs. Shuba. It is my understanding that the above recommendation will be kept confidential."

LD Tutor in the above letter means Learning Disabilities.

Because of the request of Sister Mary deAngelis, that the contents of the

above letter be kept confidential, defendant Valot did not inform plaintiff of such letter.

Since plaintiff was not being supervised by any public school principal, defendant Valot arranged with defendant, Dr. James H. Baker, Director of Instruction of defendant, Board of Education, to evaluate plaintiff. At Dr. Baker's invitation, plaintiff attended an in-service evaluation workshop on August 28, 1978 for all teachers that were going to be evaluated during the 1978-79 school year. At this workshop, the entire evaluation policy consisting of microteacher approach as well as the target approach and the procedures one would follow during the evaluation process was reviewed.

In September 1978, Dr. Baker telephoned plaintiff and advised her that he was going to visit her van for purposes of observing her teaching and to have a conference with her about her teaching and the evaluation approaches that he intended to follow. Dr. Baker made approximately eight observations of plaintiff's teaching. Based on his evaluations of plaintiff, defendant Dr. Baker recommended to defendant Mr. Valot that plaintiff's teaching contract be nonrenewed because of her poor performance as a teacher.

Defendant Mr. Valot agreed with Dr. Baker and recommended in conjunction with the county superintendent, to defendant Board of Education that plaintiff's teacher contract be nonrenewed.

Defendant Board of Education followed such recommendation.

By notice, dated April 23, 1979, defendant Board of Education notified plaintiff that it was not the intention of defendant Baord of Education to reemploy plaintiff at the expiration of her Limited Teacher's Contract.

Pursuant to a policy of defendant Board of Education, plaintiff conferred twice with Mr. Valot in May 1979 concerning her nonrenewal once with plaintiff alone and once with plaintiff and Mr. Donald H. Evans, president of the Austintown Education Association. Plaintiff then asked to be heard by defendant Board of Education. Defendant Board of Education granted her request and permitted plaintiff to be heard at their June 1, 1979 meeting in executive

session at which plaintiff appeared with Mr. Evans and Attorney David Roloff, whose assistance was obtained for plaintiff by Mr. Evans through the Ohio Educational Association. This meeting did not change defendant Board of Education's nonrenewal of plaintiff's contract.

Plaintiff became dissatisfied with the services of Attorney Roloff and she retained the services of Attorney Judith A. Nicely of Akron, Ohio, who filed the complaint in the case on September 26, 1980.

Defendant Board of Education filed a motion for attorney fees pursuant to 42 U.S.C. Section 1988, which was overruled by the trial court. Defendant Board of Education filed an appeal on this judgment of the trial court.

Plaintiff's first assignment of error is that the trial court erred in granting defendants' motion for summary judgment on plaintiff's Breach of Contract pursuant to Ohio Revised Code 3319.11 (continuing service status and contract) and a subsequent wrongful discharge pursuant to Ohio Revised Code 3319.16 (termination of contract by Board of Education without due process hearing).

This assignment of error is Count I in plaintiff's complaint.

R.C. 3319.11 provides, in pertinent part, as follows:

> "Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district,...."

Plaintiff contends that she was eligible for continuing contract when she was rehired for the 1978-79 school year.

"...."

In instant case, it was established that plaintiff was a teacher and had taught for at least three years in the district. On of the issues in this case was whether she held a professional certificate at the time of her re-employment on August 28, 1978.

R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year.

Plaintiff contends that when she signed her contract with defendant Board of Education on August 28, 1978, for the 1978-79 school year, she had given notice of her application and eligibility for tenure prior to signing the contract.

When plaintiff was rehired by defendant Board of Education on August 28, 1978, for the 1978-79 school year, she had a provisional teaching certificate. However, on June 23, 1978, plaintiff filed her application and credentials for a professional teacher's certificate to the Mahoning County Board of Education for submission to the State Board of Education.

Section 3301-21-09(c)(1) of the Ohio Administrative Code provides, in pertinent part, that an applicant for a professional teacher's certificate must be employed full-time in the schools of Ohio at the time of application.

Since plaintiff's employment with defendant had been terminated at the end of the 1977-78 school year, the superintendent of the Mahoning County

Board of Education did not forward plaintiff's application for a professional teacher's certificate to the State Board of Education until plaintiff's re-employment for defendant Board on August 28, 1978. The State Board of Education issued a professional teacher certificate on October 19, 1978, for the period from July 1, 1978 through June 30, 1986.

Plaintiff contends that she had a professional teacher certificate on August 28, 1978 on the basis of the language on her professional teacher certificate. Defendant Board contends that a teacher desiring a continuing contract must have his or her professional teacher certificate by the preceding April 30 when limited contracts have to be renewed or nonrenewed.

Defendant Board of Education attached to its Motion for Summary Judgment, dated September 14, 1981, the affidavit of Martha F. Dimit, Assistant Director of the Division of Teacher Education and Certification, Ohio Department of Education, which consisted of eight pages. The pertinent part of such affidavit is as follows:

> "23. On July 1, 1976, the Division of Teacher Education and Certification implemented a procedure whereby all teacher's certificates are given an effective date of July 1 in the school year they are issued, regardless of the date of issuance of the certificate. Prior to July 1, 1976, all teacher's certificates were given an effective date of September 1 in the school year they were issued. The current July 1 date is assigned to all certificates for administrative convenience only so that there is a uniform expiration date of June 30 on all certificates. The date of issuance is separately noted on each teaching certificate issued by

the Division." (Emphasis added.)

Prior to April 30, 1978, plaintiff was notifed by defendant Board of Education that it was not its intention to re-employ plaintiff at the expiration of her Limited Teacher's contract.

The established case law is that under the facts of instant case, plaintiff was not entitled to a continuing contract because her employment had been terminated by defendant Board of Education at the expiration of plaintiff's Limited Teacher's contract for the 1977-78 school year. State, ex rel. Hura v. Board of Education (1977), 51 Ohio St. 2d 19; State, ex rel. Paul v. Board of Education (1975), 44 Ohio St. 2d 5; Pascoe v. Board of Education (Feb. 18, 1983) Erie County

Case No. E-82-32 (Unreported, Ct. App. 6th District) m.c.o. May 25, 1983.

We agree with the above cited cases and hold that plaintiff was not entitled to a continuing contract on her reemployment in August 1978 under the facts of this case.

Plaintiff, in her brief and assignments of error which was filed September 6, 1983, raised the issue that tenured teachers have a right to receive notice of the reasons for their terminations and a right to a hearing on such terminations pursuant to R.C. 3319.16. Since we have determined that plaintiff had not obtained tenure, we hold that R.C. 3319.16 does not apply to plaintiff's termination.

"...." (The remaining argument regarding Austintown's Teacher Contract

Non Renewal Policy is not on appeal and omitted. p 11-16 of original appeal.)

Plaintiff's third and fourth assignments of error are as follows:

> 3. The court erred by granting defendants' motions for summary judgments in regards to Kathryn Shuba's deprivation of equal protection and due process causes of action.
>
> 4. The court erred in granting summary judgment in plaintiff's cause of action which alleged that Mr. Valot and Dr. Baker conspired to deprive her of her constitutional rights.

Plaintiff's third assignment of error is Count III in Plaintiff's complaint and her fourth assignment of error is Count IV in plaintiff's complaint. We will discuss these assignments of error together because they are interrelated. The actions of defendants, Mr. Valot and Dr. Baker, which were done in the performance of the

duties of the positions they held with defendant Board, are the basis for both assignments of error.

Plaintiff alleges, pursuant to Title 22 (sic 42) of the United States Code, Sections 1983 and 1985 (3), that she has been deprived of "...rights, privileges and immunities secured by the constitutional laws of the United States..." by actions of defendants, Mr. Valot and Dr. Baker, under color of law by discriminating against plaintiff by segregating her in a parochial school.

Section 1984 of Title 22 (sic 42) of the United States Code provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress...."

Section 1985 of Title 22 (sic 42) of the United States Code provides, in pertinent part, as follows:

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a

> legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United Sttes, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

We have set out the entire context of Section 1985(3) of Title 22 (sic 42) because we do not think that any part of the above quoted language applies to the facts of this case.

The facts in this case are not included in a "suspect classification" or impair a fundamental right. "Suspect classifications" include those based on alienage, race or ancestry "Fundamental rights" include the right to vote and for interstate travel. Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, 312 n. 3 and 4.

Under the facts of this case, we hold that the "rational basis" test is applicable. In Bd. of Edn. v. Walter (1979), 58 Ohio St. 2d 368, the court, at page 376, stated as follows:

> "Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity. Ordinarily, under the rational basis requirement, any classification based 'upon a state of facts that reasonably can be conceived to constitute a distinction, or differences

in state policy...' will be upheld. Allied Stores of Ohio v. Bowers (1959) 358 U.S. 522, 530.

"This court, in adopting this standard, has held that every statute is presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt. Paragraph one of the syllabus in State, ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142 states:

"An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'

"It is against this standard that we must determine if a violation of the Equal Protection and Benefit Clause exists here."

We have previously held in this opinion that plaintiff did not have a continuing contract with defendant Board. In Matheny v. Bd. of Edn. (1980), 62 Ohio

St. 2d 362, the court, on page 364, stated, in pertinent part, as follows:

> "We hold that under the provisions of R.C. Chapter 3319, a non-tenured teacher has no expectancy of continued employment past the term of his limited contract. Therefore, there is no property right involved here as claimed by appellants."
>
> In accord: DePas v. Board of Edn. (1977), 52 Ohio St. 2d 193.

Pertinent headnotes of Ryan v. Aurora City Bd. of Education (1976, 6th Cir), 540 F. 2d 222 Cert denied; 429 U.S. 1041 (1977), are as follows:

> "2. Civil Rights Act of 1871 was never intended as catchall statute under which myriads of suits, traditionally within exclusive jurisdiction of state courts, might be filed in federal cours in absence of showing of deprivation of constitutional right. 42 U.S.C.A. Sec. 1983; U.S.C.A. Const. Amend. 14.
>
> "3. Judicial review in actions of school authorities involving

administration of state teacher tenure laws is in state court, not federal courts, with exception of cases involving teachers' constitutional rights of free speech, self-incrimination, equal protection and due process. U.S.C.A. Const. Amends. 1, 5, 14.
"....

"5. Nontenured teacher had no expectancy of continued employment, whatever might be policies of institution, where there existed statutory tenure system; since property interests were created by state law and not Constitution, fact that state limited guarantee to only tenured teachers necessarily negatived any property interest. R.C. Ohio Secs. 3319.08, 3319.11, 3319.16; U.S.C.A. Const. Amends. 1, 5, 14; 42 U.S.C.A. Sec. 1983.
"....

"8. Necessity for statement of reasons for nonrenewal of nontenured teachers' employment contracts, and adequacy or accuracy of such statements, are matters of state law, not federal constitutional law."

In accord: Bishop v. Wood (1976), 426 U.S. 341; Orr v.

Trintor (1971 - 6th Cir) 444 F.2d 128; Cert. denied; 408 U.S. 942 (1972) reh. denied 409 U.S. 943 (1972).

In Great American Federal Savings & Loan Ass'n v. Novotny (1979), 442 U.S. 366, the court held, in pertinent part, as follows:

> "Section 1985 (3)...creates no substantive rights itself but is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right -- to equal protection of the laws or equal privileges and immunities under the laws -- is breached by a conspiracy in the manner defined by the section."
>
> See United Brotherhood of Carpenters and Joiners of America v. Scott (1983) _____ U.S. _____, 77 L. Ed 2d 1049.

The constitutionality of the auxiliary services program was under attack in federal courts at the beginning of plaintiff's employment with defendant Board. This issue was uncertain until

July 24, 1977 when the constitutionality of this program was upheld in Wolman v. Essex (1977), 433 U.S. 233. However, because of said case, defendant Board had to provide such auxiliary services in mobile units located off the nonpublic school premises. Wolman v. Essex (1977), 433 U.S. 233, 244-48; R.C. 3317.06(G). Because of this, such auxiliary services teacher did not have a public school principal supervising them as was the case with public school teachers and they were isolated from other public school teachers because they had to teach in a mobile van near the parochial school where they were teaching. Also, parochial school principals have discretion annually as to how they will use available auxiliary service funds.

17 Ohio Jurisprudence 3d 153-155, Constitutional Law, Section 630, states as follows:

> "Neither the state nor federal constitutional provisions guaranteeing equal protection of the laws deprives the Ohio General Assembly of a broad power of classification and differentiation of persons and subject matter in legislative enactments. Indeed, classification is an inherent right and power in the legislature, and the constitutional guaranty of equal protection of the laws does not dispense with all classification. Constitutional provisions against discriminatory laws do not require laws to apply to every one within the state and to affect all in an identical manner. The Constitution does not exclude class legislation, provided there is reasonable basis for the classification. If a particular classification is proper the discrimination it involves is unobjectionable.
>
> "So long as classifications have a real and substantial basis they cannot be said to be violative of the equal protection clause even though

> the lines drawn therein are very narrow. If the law affects all similarly situated in the same manner, it satisfies the constitutioanl requirement."
>
> See Board of Regents v. Roth (1972), 408 U.S. 564.

We hold that the conditions under which auxilary services teachers, such as plaintiff, worked in the Austintown School District, were a result of the United States Supreme Court decision upholding the constitutionality of governmental aid to religious nonpublic schools and that this was a real and substantial basis for the conditions of employment for such auxiliary services teachers.

Specifically, plaintiff alleges that defendant Board violated its policies set out in Austintown's Policy Hankbook in its treatment of plaintiff in the

following policies: (1) Contracts; (2) Evaluation; (3) Professional Personnel Policy; (4) Special Reading Classes; (5) Appointment, Assignment and Transfer of Employees; (6) Grievance Procedures; (7) Equal Oportunity Policy; and (8) Reduction in Force Policy.

Plaintiff claims that auxiliary services teachers were treated differently from regular teachers in that auxiliary services teachers' contracts contained language that continued service was contingent upon funding by the State of Ohio. There was no authority for such language either by statute or from the state Board of Education. Auxiliary services was new to the public school superintendents in Ohio during subject time period and there was no guidance from the State Board of Education as to

what type of limited contracts to give to auxiliary service teachers. Mr. Valot testified that such language was used in the beginning years of such contracts, because the constitutionality of such program was being litigated in the federal courts. Eventually, they eliminated such language from the auxiliary service contracts. The only purpose that such language served was to inform auxiliary services teachers that their services were being solely paid by state funds and was contingent upon such funds. Plaintiff was discharged for poor performance rather than because of subject language so that we cannot understand how subject language prejudiced plaintiff.

Plaintiff points out that the Austintown's Teacher Contract Policy

provided that a limited contract should be for one (1) year and the plaintiff's contract received a limited contract from September through June. R.C. 3313.62 provides that a school year shall be from July 1 to June 30 of the succeeding calendar year. We hold that plaintiff's limited contracts with defendant Board complied with R.C. 3313.62.

Plaintiff also points out that all auxiliary services limited teaching contracts were terminated in April of each year. Evidence of defendant Board was that teachers in public schools in special programs were also similarly nonrenewed contingent upon the programs being refunded by the state or for reduction in force.

Plaintiff also claims, under this assignment of error, that defendant Board

did not comply with its "Teacher Contract Non-Renewal Policy" because plaintiff was not advised of the reason for her non-renewal and none of her witnesses were allowed to testify at the June 1, 1979 meeting of defendant Board. This was discussed and determined under plaintiff's first assignment of error.

Plaintiff has three complaints on her evaluation. She points out that Austintown's Policy Handbook under the title of "Management of Staff Evaluation" provides that all staff members in their first and second year of employment will participate in a professional growth evaluation process and that plaintiff was evaluated for the first time in her fourth and final year of teaching. Mr. Valot testified that this rule was changed in 1978; that prior to that time

the rule stated that "Initial formal evaluation should focus on second year staff members;" that the principal of each school performs such evaluations and that he assumed that the principal of Immaculate Heart of Mary evaluated plaintiff because such principal had to recommend plaintiff for employment each year. Immaculate Heart of Mary had no record of evaluations of Plaintiff.

There is nothing in the record to indicate that Mr. Valot deliberately overlooked the professional growth evaluation process of plaintiff. That was a matter that he delegated to the principals of schools, and plaintiff did not have a public school principal. We hold that that is not a constitutional question pursuant to the Ryan Case.

Plaintiff points out that unlike teachers in the public schools, who were evaluated by their principals, plaintiff was evaluated by Dr. Baker, Director of Instruction. We hold that this was a condition of employment for plaintiff that was common to all auxiliary service teachers as a result of the United States Supreme Court decision in Wolman v. Essex (1977), 433 U.S. 233 and that defendant Board and this court are bound by such decision.

Plaintiff complains that the evaluation done by Dr. Baker was threatening, confusing, subjective and unreasonable. Both Mr. Valot and Mr. Donald H. Evans, president of the Austintown Education Association, testified that Dr. Baker is the most trained and best qualified in the

Austintown School System to give evaluations of teachers.

Plaintiff also complained that Dr. Baker evaluated plaintiff by both the Micro Teaching observation and the appraisal by Targets instruments. We hold that the person performing such evaluation is authorized to use both instruments for evaluation by the applicable policy statement.

We have reviewed plaintiff's claims of alleged violations by defendant Board of its policies on Professional personnel Policy; Special Reading Classes; Appointment, Assignment and Transfer of Employees; Grievance Procedures; and Reduction in Force and hold that such claims are irrelevant to this action.

Plaintiff's claim as to the policy in Austintown's Policy Handbook entitled

"Equal Opportunity Policy" deals with alleged age discrimination against plaintiff. We have discussed and determined this claim under plaintiff's second assignment of error.

The record of this case establishes that defendants, Mr. Valot and Dr. Baker, attempted to treat plaintiff the same as the teachers in their public school system as much as it was possible to do so under the circumstances that plaintiff was hired under the auxiliary services program.

We hold that plaintiff was not deprived of constitutional equal protection and due process rights in this case. We further hold, as a matter of law, that Sections 1983 and 1985(3) of Title 22 (sic 42) of the United States

Code are inapplicable to the facts of this case pursuant to the Ryan case.

For the foregoing reasons, we hold that neither Sections 1983 or 1985 of Title 22 (sic 42) of the United States Code are applicable to this case and that plaintiff's third and fourth assignments of error are without merit.

"...." (Plaintiff's fifth and sixth assignment of error are not on appeal. Pages 28 - 36 of decision omitted.)

JOURNAL ENTRY OF THE COURT OF APPEALS

Case No. 83 C.A. 81

IN THE COURT OF APPEALS

SEVENTH JUDICIAL DISTRICT

* * * *

KATHRYN A. SHUBA

Plaintiff / Appellant

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant / Appellee

* * * *

JOURNAL ENTRY

For the reasons stated in the opinion rendered herein, it is the final judgment and order of this court that judgment of the Common Pleas Court of Mahoning County, Ohio, is affirmed as to Counts II, III, IV and V of plaintiff's complaint and amended complaint as well as overruling plaintiff's motion for a

jury trial. As to Count I of plaintiff's complaint, judgment is affirmed as to the part holding that plaintiff was not entitled to a continuing contract on her re-employment in August 1978 and reversed as to the part on factual questions as to whether plaintiff was advised by defendant Board of Education of the reason for its non-renewal of her teacher's contract or April 23, 1979 and whether she was permitted to have witnesses testify at the June 1, 1979 meeting of defendant Board of Education.

Judgment reversed on the overruling of defendant Board of Education's motion for an award of attorney fees pursuant to 42 U.S.C. Section 1988 as to Counts III, IV and V.

Case remanded for further proceedings pursuant to law as to the

factual questions at issue in Count I of plaintiff's complaint and as to defendant Board of Education's motion for attorney fees pursuant to 42 U.S.C. Section 1988.

Final judgment as to defendant Board of Education's motion to order plaintiff to answer its Requests for Admissions. The motion of defendant Board of Education to order plaintiff to answer defendant Board's Request for admissions sustained. plaintiff must admit or deny each of the six requests within ten (10) days after the journalization of this opinion pursuant to Civil Rule 37(A) or such requests for admission will be admitted as true. Costs to be pro-rated between the appellant and appellees.

/s/ JOHN J. LYNCH
Retired

FINDING OF THE COURT OF COMMON PLEAS

(Filed February 5, 1982)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

FINDING

Motion of Defendant for Summary Judgment Count I Sustained.

Motion of Plaintiff for Summary Judgment Court I Overruled.

/s/ Judge E. Jenkins

ORDER AND JUDGMENT OF THE

COURT OF COMMON PLEAS

(Filed September 9, 1982)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

ORDER AND JUDGMENT

This matter came on for hearing pursuant to separate Motions for Summary Judgment filed by each of the defendants, Austintown Board of Education, Merlin H. Valot, Jr., and Dr. James H. Baker. The issues presented to the Court for

determination by summary judgment include Counts Two, Three, and Four of the plaintiff's Complaint. Arguments were presented by all counsel to the Court at a hearing on July 13, 1982. Each of the parties to this lawsuit have filed Briefs setting forth their respective positions.

Count Two of the plaintiff's Complaint alleges that she was discriminated against due to her age, in violation of Ohio Revised Code Section 4101.17. Based upon the pleadings, depositions which have been filed with the Court, and the Briefs of the parties, the Court finds that there is no genuine issue as to any material fact with regard to Count Two of the plaintiff's Complaint and further, that each of the defendants are entitled to judgment as a matter of law. The Court finds that upon

reviewing the evidence and construing such evidence most strongly in favor of the plaintiff, reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

Count Three of the plaintiff's Complaint alleges that the plaintiff has been deprived of her life, liberty, and property without due process of law and that her right to equal protection of the law under the Ohio Statutes, Constitution of the State of Ohio, and the Fourteenth Amendment of the Constitution of the United States. Plaintiff also alleges deprivation of rights privileges and immunities in accordance with Title 42 §1983 U.S.C. After listening to the arguments of the parties and carefully reviewing the depositions and pleadings which have been filed with the Court, the

Court finds that there is no genuine issue as to any material fact and that each of the defendants are entitled to judgment as a matter of law. Upon reviewing the evidence and construing such evidence most strongly in favor of the plaintiff, the Court finds that with regard to Count Three of the plaintiff's Complaint that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

Count Four of the plaintiff's Complaint alleges that in accordance with Title 42 of the United States Code, Section 1985(3), she has been deprived of rights, privileges, and immunities secured by the Constitutional Laws of the United States. Plaintiff further alleged that a conspiracy was formed between Merlin H. Valot, Jr. and Dr. James H.

Baker for the purpose of depriving her of equal protection of the laws and due process. Based upon the arguments of counsel at the hearing on July 13, 1982, and after careful review of the Briefs which have been filed by each of the parties, the pleadings, and the depositions filed with the Court, the evidence shows that there is no genuine issue as to any material fact and that each of the defendants are entitled to judgment as a matter of law on Count Four of the plaintiff's Complaint. Based upon all of the evidence, and construing such evidence most strongly in favor of the plaintiff, the Court finds that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the Motions for Summary Judgment filed by the defendants, Austintown Board of Education, Merlin H. Valot, Jr., and Dr. James H. Baker, are granted. Counts Two, Three, and Four of the plaintiff's Complaint are hereby dismissed as to each of the named defendants.

/s/ Judge E. Jenkins

FINDING OF THE COURT OF COMMON PLEAS

(Filed June 15, 1983)

Case No. 80 CV 1712

IN THE COURT OF COMMON PLEAS

Mahoning County, Ohio

* * * *

KATHRYN A. SHUBA

Plaintiff

vs.

AUSTINTOWN BOARD OF EDUCATION

Defendant

* * * *

This day came on for consideration by the Court the two matters still pending, and the Court, being fully advised in the premises, finds:

(1) Motion for Summary Judgment on Count V -- The Court considers that the Judgment Entry, J. 540 P. 303, may have left unresolved the Motions for Summary

Judgment as to defendants Austintown Board of Education and Dr. James Baker. In order to resolve the same, the Court finds that there is no genuine issue as to any material fact with regard to Count V as to the defendants Austintown Board of Education and Dr. James Baker, and that such defendants are entitled to judgment as a matter of law. The Court finds that upon reviewing the evidence and in construing such evidence most strongly in favor of the plaintiff, reasonable minds can come to but one conclusion, and that conclusion is adverse to the plaintiff and in favor of the defendants. The Motions for Summary Judgment filed by such defendants are granted. Count V is dismissed.

"...." The second part of the Order is omitted; it is not on appeal.

PETITIONER'S PROPOSITIONS OF LAW ASSIGNED IN THE SUPREME COURT OF OHIO

Proposition of Law No. 1:

A board of education that disparately treats a teacher soley because the teacher has been assigned to the auxiliary services program violates equal protection as guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 2, of the Ohio Constitution.

Proposition of Law No. 2:

A teacher who has, or should have had, a professional certificate but for the actions of the board of education is entitled to a continuing contract.

Proposition of Law No. 3:

As a holder of a professional teaching certificate and entitled to a continuing contract of employment, a

teacher is entitled to due process as embodied in the procedural requirements of Ohio Revised Code §3319.16 and the Austintown Board of Education policies.

Proposition of Law No. 4:

A teacher who holds a professional certificate has a property and liberty interest protected by the Ohio Constitution and the Fourteenth Amendment of the United States Constitution.

Proposition of Law No. 5:

By terminating a teacher's contract without just cause, Austintown violated Ohio Revised Code §4101.17 which prohibits age motivated firings.

PETITIONER'S ASSIGNMENTS OF ERROR

IN THE COURT OF APPEALS

1. The Court erred in granting defendant's motion for summary judgment on plaintiff's breach of Contract pursuant to Ohio Revised Code §3319.11 (continuing service status and contract) and a subsequent wrongful discharge pursuant to Ohio Revised Code §3319.16 (termination of contract by board of education without due process hearing).

2. The court erred in granting defendant's motion for summary judgment on plaintiff's cause of action alleging age discrimination pursuant to Ohio Revised Code §4101.17.

3. The court erred by granting defendants' motions for summary judgments in regards to Kathryn Shuba's deprivation

of equal protection and due process causes of action.

4. The court erred in granting summary judgment in Kathryn Shuba's cause of action which alleged that Mr. Valot and Dr. Baker conspired to deprive her of her constitutional rights.

5. The court erred in failing to grant a jury trial on the issues of age discrimination, deprivation of equal protection and due process rights, conspiracy to deprive appellant of her constitutional rights and excessive entanglement between Austintown Local Schools and the parochial schools pursuant to the United States Constitution First Amendment.

6. The court erred in granting summary judgment on plaintiff's cause of action alleging that the excessive

administrative and political entanglement between Austintown Local Schools and the parochial schools deprived appellant of her constitutional rights.

OHIO REVISED CODE §3317.06

Distribution of payments for special programs.

Moneys paid to school districts under division (P) of section 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes: ...

(G) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in nonpublic schools that have no religious or sectarian affiliation, in public centers, or in mobile units located off of the nonpublic premises as determined by the department of education. If such services are provided in the public school or in public centers, transportation to and from such

facilities shall be provided by the school district in which the nonpublic school is located....

OHIO REVISED CODE §3319.11

Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, ...

OHIO REVISED CODE §3319.16

Termination of contract by board of education.

The contract of a teacher may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of

the board of education; or for other good and just cause. Before terminating any contract, the employing board shall furnish the teacher a written notice signed by its treasurer of its intention to consider the termination of his contract with full specification of the grounds for such consideration. The board shall not proceed with formal action to terminate the contract until after the tenth day after receipt of the notice by the teacher. Within ten days after receipt of the notice from the treasurer of the board, the teacher may file with the treasurer a written demand for a hearing before the board or before a referee, and the board shall set a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the treasurer

shall give the teacher at least twenty days notice in writting of the time and place of the hearing....

OHIO REVISED CODE §3319.25

Professional certificates.

The state board of education may convert any provisional certificate or renewal thereof into a professional certificate of like type valid for eight years, provided the applicant has met the standards of preparation, experience, and teaching success set by the board for the conversion applied for.

NOTICE-TERMINATION OF CONTRACT

Rev. Code, Sec. 3319.11

OFFICE OF THE BOARD OF EDUCATION

of Austintown Local School District

225 Idaho Road

Youngstown, Ohio

April 23, 1979

To Mrs. Kathryn A. Shuba

3421 Bentwillow Lane

Youngstown, OH 44511

YOU ARE HEREBY NOTIFED that is is NOT the intention of this Board of Education to re-employ you at the expiration of your Limited Contract.

THE BOARD OF EDUCATION

/s/ John J. Dick, President

/s/ Robert R. Williams, Treasurer